

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

PARIS LaPRIEST POWELL,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-10-1294-D
)	
ROBERT BRADLEY MILLER,)	
et al.,)	
)	
Defendants.)	

**PLAINTIFF PARIS POWELL S RESPONSE TO MOTION
TO DISMISS OF DEFENDANT DURBIN, LARIMORE, AND BIALICK,
BRIEF IN SUPPORT**

**I.
STANDARDS FOR ADJUDICATING MOTIONS TO DISMISS**

A complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief. Federal Rule of Civil Procedure 8.

All averments in the complaint must be construed in the light most favorable to the plaintiff. **Scheuer v. Rhodes**, 416 U.S. 232 (1974).

Although a Court need not accept as true allegations consisting of mere conclusions or formulae, factual allegations which are plausible are sufficient. **Twombly**, 550 U.S. 554, 555, 5550 U.S. 554, 555, 56550 U.S. 554, 555, 562-63 (2007). A complaint must contain enough probability that the Plaintiff is entitled to relief, but must not contain enough probability that the

reasonable expectation that discovery will reveal [sufficient] evidence ... **Id.** at 556-57.

II.

SECTION 1983 CLAIM AGAINST DURBIN, LARIMORE, AND BIALICK

A. Particularity of Pleading

Plaintiff Plaintiff Powell has pleaded that Defendant Robert Bradley Miller Defendant Robert
maliciousmalicious prosecution of Paris Powellmalicious prosecution of Paris Powell as part ofmalicious

Plaintiff alleged:

Mr.Mr. MillerMr. Miller utilized the offices and employees of Durbin, Larimore, andMr. Mil
inin the pursuit of the continued and wrongful incarceration of Paris Powell. in the pursu
usedused office equipmentused office equipment and office staff toused office equipment and offic
favorablefavorable treatment of Derrick Smifavorable treatment of Derrick Smith. Thefavora
Miller sMiller s attempts,Miller s attempts, for aMiller s attempts, for a time successful, to keep hi
beenbeen misinformed regardingbeen misinformed regarding Smith sbeen misinformed regarding S
to Miller s attemptto Miller s attemptto Miller s attempts, for a time successful, to keep hi
conconvictionsconvictions and death sentence were unreliable and in contravention of the Fourteenth
Amendment to the federal constitution.

(Complaint, ¶ 58)

BeBecBecauseBecause these allegations plausibly suggest that the Derrick Smith/Paris Powe
activityactivity was that ofactivity was that of the law firm, and not justactivity was that of the law firm, and
to withstand a motion to dismiss.

TheThe complaint further alleges that Miller was acting, during the time period he was
employedemployed at Durbin, Larimore, and Bialick in conceremployed at Durbin, Larimore, and B
CountyCounty District AtCounty District AttorneyCounty District Attorney s Office in assurin
incarceration. (Complaint, ¶ 60)

Therefore the allegations are similar to facts found sufficient to withstand

summary judgment in **Lusby v. T.G.&Y. Stores, Inc.**, 749 F.2d 1423, 1432-33 (10th Cir.

1984) **vacated on other grounds**, 474 U.S. 805 (1985):

T.G. &Y. contends that the trial court erred in submitting to the jury the plaintiff s §1983 claims against it because plaintiffs offered no evidence that T.G.&Y. acted under color of state law. T.G.&Y. is not liable for a civil rights violation simply because it employed Gent. We have held that a private entity that employs an off-duty police officer is not vicariously liable for its employee s deprivations of citizens civil rights. [citations omitted]

Nevertheless, T.G.&Y. and its managers acted under color of state law within the meaning of §1983 because they were acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbidden rule or procedure.

The allegations stated in Paris Powell s complaint are sufficient to raise a reasonable expectation that discovery ... (**Twombly** at 557) will lead to evidence proving that Defendant Durbin, Larimore, and Bialick, like Defendant T.G.&Y., was engaged in the unconstitutional activity as an event of the company, not as event of the individual separated from the company.

Particularly, where, as here, most facts regarding the law firm s involvement in the case will be within the peculiar knowledge of the law firm, the allegations as stated are sufficient to warrant discovery to supply the details of the firm s activity.

In the alternative, the Plaintiff requests permission to amend the complaint and states that upon amendment, these additional facts, at a minimum could be alleged:

The law firm maintained a file regarding the Paris Powell/Derrick Smith situation and referred to the file by number when responding to an inquiry from the Oklahoma Bar Association.

Members of the law firm, including lead partner Gerald Durbin, attended a substantial part of the federal court evidentiary hearing in the habeas corpus case relating to Paris Powell's death sentence. Mr. Durbin and at least three other persons associated with the firm were present during Mr. Miller's testimony in that case.

While Paris Powell's habeas case was pending, consultation with personnel from the Oklahoma Attorney General's Office occurred at the offices of Durbin, Larimore, and Bialick.

B. Color of State Law Contentions

Plaintiff Powell's complaint alleges that Mr. Miller, acting as an employee of Durbin, Larimore, and Bialick, was acting in concert with employees of the Oklahoma County District Attorney's Office in suppressing exculpatory evidence and perpetuating false evidence which kept Paris Powell wrongfully convicted. (Complaint, ¶ 60)

It is not necessary for an entity to be governmental itself to be liable under 42 U.S.C. § 1983. Section 1983 liability can occur if the entity acts in concert with a governmental actor. **Dennis v. Sparks**, 449 U.S. 24, 27 (1980). This jointly liable private entity does not necessarily have to be an individual. A corporate private entity can also incur section 1983 liability. See **Lugar v. Edmondson Oil Co., Inc.**, 457 U.S. 922 (1983). See also **Lusby v. T.G.&Y. Stores, Inc.**, 749 F.2d 1423, 1432-33 (10th Cir. 1984) **vacated on other grounds** 474 U.S. 805 (1985).

C. Respondeat Superior Liability

Plaintiff agrees that respondeat superior is not a correct method of describing the way in which a corporation may incur section 1983 liability. Even though the phrase respondeat superior was used in Mr. Powell's complaint, the complaint also contains facts which create sufficient inference of the law firm's own involvement in Mr. Powell's wrongful continued incarceration for further discovery to be warranted.

D. Immunity

Defendant Durbin has cited no authority that a private entity may take advantage of immunity afforded to a governmental entity with which it acts.

The authority is not on Durbin's side. A private actor may be liable even if the governmental actor has immunity. **Dennis v. Sparks**, 449 U.S. 24, 27 (1980).

E. Negligence

Plaintiff makes no contention that section 1983 liability can be predicated solely on negligence. Plaintiff Powell's negligence and section 1983 claims are separate.

III. NEGLIGENCE AND RESPONDEAT SUPERIOR CLAIMS

The facts alleged in paragraph 58 of the complaint create a plausible case that Mr. Miller was acting within the scope of employment when he utilized the offices and resources of Durbin, Larimore, and Bialick to assist in keeping Paris Powell unconstitutionally incarcerated.

Twombly (at 556-57) requires the Plaintiff to state a plausible case that his contentions are accurate, not that he be able to prove his case in detail prior to discovery.

In the alternative, Mr. Powell requests leave to amend to include, at a minimum, the allegations, mentioned above, that consultation with the prosecution occurred at Durbin offices, that Durbin employees including the lead partner were present at the evidentiary hearing in the habeas case, and that Durbin maintained a file regarding the Derrick Smith/Paris Powell case.

IV. STATUTE OF LIMITATIONS

Defendant Durbin claims the case was filed too late because it was not brought within one year of the time the charges against Paris Powell were dismissed.

However, the statute of limitations for a section 1983 case predicated on malicious prosecution is two years from the time of dismissal. **Beck v. City of Muskogee Police Department**, 195 F.3d 553, 560 (10th Cir. 1999).

Since, as Defendant Durbin states, the charges were dismissed on October 2, 2009, the statute has not yet expired.

CONCLUSION

For the foregoing reasons, Plaintiff Paris Powell requests that the Court deny Defendant Durbin, Larimore, and Bialick's motion to dismiss. In the alternative, to the extent the Court finds any deficiencies in pleading, Plaintiff Powell requests to be given leave to replead.

Respectfully submitted,

/s/Mark Barrett

MARK BARRETT, OBA # 557

P.O. Box 896

Norman, Oklahoma 73070

405-364-8367

405-366-8329 (fax)

barrettlaw@sbcglobal.net

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2011, day of May, 2011, I electronically transmitted the day document to Clerk of Court using the ECF document to Clerk of Court using the ECF System for the following ECF the following ECF registrants: John Jacobsen, Assistant District Attorney, Oklahoma, Oklahoma, johjac@oklahomacounty.org; Murray Abowitz, P.O.; Murray Abowitz, P.O.; Murray Abowitz, Oklahoma, Oklahoma, 73101, mainmail@abowitzlaw.com; George Corbyn George Corbyn, 211 George Corbyn, Suite 1910, Oklahoma City, Oklahoma 73102, gcorbyn@corgcorbyn@corbynhamgcorbyn@corbynhamgcorbyn.com; Gisinger, Gisinger, P.O. Box 1937, Oklahoma City, Oklahoma 73102, gisinger@corbynhamgcorbyn.com; Amy Pierce, 211 N. Robinson, Suite 1910, Oklahoma City, Oklahoma 73101, apierce@corbynhamgcorbyn.com; Amy Steele, P.O. Box 1937, Oklahoma City, Oklahoma 73101, ars@abowitzlaw.com; Victoria Tindall, Oklahoma Attorney General's Office, Victoria Tindall, 313 N.E. 21st St., Oklahoma City, Oklahoma 73105, victoria.tindall@oag.ok.gov; John Hadden, Oklahoma Attorney General's Office, 313 N.E. 21st St., Oklahoma City, Oklahoma 73105, john.hadden@oag.state.ok.us.

/s/ Mark Barrett

MARK BARRETT

